Supreme Court, U.S.
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No. 05-28

In The

Supreme Court of the United States

RICHARD STEVENS,

Petitioner,

v.

STATE BAR OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITION FOR REHEARING

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October 19, 2005

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The petition for certiorari was timely filed on June 29 and docketed July 5. [hereinafter # 05-28] It was denied on October 3, 2005. [see *App. A*] A supplemental brief was filed on September 22, and received by the docket clerk on September 26, 2005. A prior petition in a separate matter was denied on April 21, 2003. [*In re Stevens* # 02-1259, *cert. denied,* 538 U.S. 979 (2003) – hereinafter # 02-1259] The petition in the present matter raised *Goodman* v *Georgia* et.al. Certiorari was granted in that case on May 16, 2005.[# 04-1236; 125 S. Ct. 2266 & 04-1203; 125 S. Ct. 2256 (2005); hereinafter referred to as Goodman; see Point VII of # 05-28 at page 29] As of October 17, 2005, oral argument in *Goodman* was scheduled for November 9, 2005.

OTHER SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED [Rule ¶ 44(2)]

Point I: The petition to the pending *Goodman* case was granted in large part as a result of the conflict with the Ninth Circuit in *Phiffer*. *Phiffer* relies on the *Hason* case rendered by the same Court. *Hason* has no connection to correctional facilities nor paraplegia. In this regard, *Lane, Goodman, Phiffer, Hason* and the present matter overlap one another.

> **[A]:** Abrogation of State's Eleventh Amendment economic immunity for prisoner's opportunity to be heard is within scope of Title II. That is not at issue in *Goodman.*

One important point to the landmark *Lane* case is that it is directly related to State courthouses.[*Tennessee* v *Lane*, 541 U.S. 509 (2004)] The State of Georgia's

opposition papers, filed on April 15, 2005, made clear that *Goodman* had filed at "least 60 pro se federal actions." [see Respondent's opposition to petition filed April 15, 2005, at page 1 ft. note 1 thereof] All of the allegations set forth by Mr. Goodman took place in the prison itself with there being no direct connection to his right to proceed to the judiciary. [*Goodman* v *O.T. Ray*, 120 Fed. App. 785 (2004); slip opinion attached to Solicitor General's petition for certiorari filed March 9, 2005, at pages 4a-9a]

Nonetheless, a prisoner's access to courthouses is an issue that is now pending before this Court. The reason is that the question presented by counsel to *Goodman* is "to what extent" does Title II abrogate the State's Eleventh Amendment immunity ? [see Petition for *Goodman* filed March 9, 2005] It may be that for purposes of damages, the response to the query is that the State's sovereign immunity is abrogated when the deprivation is linked to the right to proceed to court. This would include the prisoner's right to speak to his attorney and/or to research the matter in a law library, and of course, the right to have actual access to the courtroom and its judiciary.[see i.e. *Lewis* v *Casey*, 518 U.S. 343, 351-352 (1996)]

Petitioner's reading of *Lane* is that if any of those questions were raised by *Goodman*, a dismissal by the State would be denied in all respects. Since this is not the case, the Eleventh Circuit's judgment appears proper. This is regardless of whether or not its specific reasoning is accurate. [*Goodman* v O.T. *Ray*, *supra*].[1]

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[1] Petitioner does not agree or disagree with the 11th Circuit's distinguishing the "positive due process" 14th Amendment right with the "negative obligation to abstain from "'cruel and unusual punishment.'" [*Miller* v *King*, 384 F. 3d 1248, 1274

The heart of petitioner's claim is that access to the judiciary includes the right to *communicate* an argument in a proceeding. [42 U.S.C. ¶ 12131(2)]. Title II protects citizens with qualified disabilities to do so whether the disability is one of being hearing impaired, blindness, paraplegia, having a neurological disability, or being mentally challenged. [See # 05-28 at Point I [A] [i] [a] & I [A][ii] [b] pages 10-17]

Regardless of whether or not a person is incarcerated, the question of piercing the State's treasury depends on whether the citizen's access to the state courthouse was deprived. [see # 05-28 Point VI [B] pages 28-29 & Point I [A[ii][b] pages 13-17 citations omitted] Here lies one answer to the question posed in the pending *Goodman* matter. [also see Point B below for further issues raised]

(CA11) (2004) cited by *Goodman* v *O.T. Ray, supra,* slip opinion at page 19] Rather, the heart of petitioner's point is that there is a higher standard of scrutiny for the judiciary than any other public forum. The answer to the question of whether or not the State would concede economic liability when rights to court proceedings are deprived has not been addressed by the State. As such, petitioner is in a quandary with respect to consolidation. [see petitioners supplemental brief filed September 22, 2005]

[B]: As a result of *Phiffer*, the impact of *Hason* is revived. *Hason* applied to the judiciary and raised a medical condition that is not defined to be significant by Congress. This, together with the principles of collateral estoppel, exhaustion of state remedies, and abstention, allows petitioner to distinguish himself from *Hason.*

The Ninth Circuit in *Phiffer*, a correctional facility matter, combined its reasoning with *Hason*, which concerned itself with the arm of the judiciary.[*Phiffer* v *Columbia River Correctional Facilities*, 384 F. 3d. 791, at 792-793 (2004) citing *Hason* v *Medical Board of California*, 279 F. 3d. 1167 (CA9) (2002) petition for rehearing *en banc* denied 294 F. 3d 1166 (CA9) (2002); *Medical Board of Cal.* v *Hason, cert. granted* 537 U.S.1028 (2002); Motion to dismiss filed March 3, 2005 & taken off calendar, March 7, 2003, see 538 U.S. 901; *cert. dismissed* April 7, 2003, see 538 U.S. 958]

Clearly, the Ninth Circuit agreed with its own interpretation of Title II when she issued *Hason* in 2002. [*supra*] After *Lane* was rendered, that Court found that any immunity raised by the State was already settled and "rejected" by the panel. [*Phiffer supra* at 792-793 citing *Hason supra*] Although the concurring opinion in *Phiffer* made clear that *Dare* v *California*, 191 F. 3d 1167 (CA9) (1999) and *Clark* v *State of California*, 123 F. 3d 1267 (CA9) (1997) were "*binding*" upon him,[2] Judge O'Scannlain warned that panel that *Lane* applied to "courtroom access" and was restricted to cases where a "fundamental right" was at issue. [*Phiffer, supra* at 793]

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[2] This was as a result of the Circuit Court's denying an *en banc* hearing in *Hason*. [*supra, Hason*, 294 F. 3d. 1166, at 1167 –1171 (O'Scannlain J. dissenting)]

The merits of *Hason*, however, were in no fashion or mode ever before this Court when it rendered its decision in *Lane*. *Medical Board of State of California* v *Hason* was taken off calendar as a result of the Attorney General and State Solicitor General's motion to dismiss. [*supra*, 538 U.S. 901, see Rule ¶ 46 (2) (a)] In no fashion did *Lane* ever suggest that it endorsed, distinguished, or included the *Hason* matter. Indeed, the strong inference under these circumstances is that *Hason* can never be deemed to have been approved by this Court in *sub silentio* fashion. [see i.e. *Will* v *Michigan Dep't. of State Police*, 491 U.S. 58, 63 n. 4 (1989); see # 02-1259 at Point II [A] [ii] at page 25]

There are four (4) distinguishing points to *Hason* that have been raised by petitioner since 2003. [see # 02-1259, & # 05-28] The first is that *Hason* did not exhaust the state's appellate process. This raises the doctrine of abstention. [see # 05-28 Point VI [B] pages 28-29 ft. note 13 citing and comparing *Huffman* v *Pursue Ltd.* 420 U.S. 592, 609 (1975); also see # 02-1259 Point II [A][ii] pages 24-26]

Indeed, the State of California made clear that Mr. *Hason* had the statutory right to appeal the Medical Board's decision. [see Cal. Govt.' Code ¶ 11504; Cal. Code of Civ. Procedure ¶ 1094.5 -- cited in petition for certiorari filed by California on September 23, 2002, and its main brief page 4, filed January 10, 2003; see present petitioner's main brief to California Supreme Court – filed March 2nd 2005, Point II [E] at page 35]. *Hason* abandoned the hearings while the state proceedings were "ongoing". It appears that the application of abstention under those circumstances was "never squarely faced" by this Court.

[see # 02-1259 Point II (A) (ii) at page 25 citing *New Orleans Public Service Inc.* v *Council City of New Orleans,* 491 U.S. 350, 369 ft. note 4 (1989)]. [3]

The second is that *Hason* did have the opportunity to submit expert testimony at the hearing. Collateral estoppel would apply. [see # 05-28 Point III page 21 ft. note 12, citing *Hason* v *Department of Health*, 295 A.D. 2d 818 (Third Dept. 2002)]. This was not the case at hand. New York simply excluded the timely offered testimony altogether. California insists that the expert be bound by the findings of the sister state. The condition precedent for preclusion failed. Petitioner never had an "*opportunity to be heard.*" [emphasis added, see # 05-28, Point III pages 20-21 quoting *Bernhard* v *Bank of America*, 19 Cal. 2d 807, 811; 122 P.2d 892, 894, (1942) Traynor J.]

The third is that this Court relied on 29 U.S.C. 794a(a)(2), and/or Rehabilitation Act ¶ 505, for purposes of "remedies and procedures." [# 05-28 page 2 ft. note 1 citing *Lane*, *supra* at 517, and 42 U.S.C. ¶ 12133] These symptoms fall under the Congressional definition of *significant disability*. [see # 05-28 at page 2 ft. note 1 re: *In re Stevens*: "head injury" "epilepsy" --- *Lane*: "paraplegia"

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[3] By comparison, plaintiff *Lane* exhausted the state judicial process. [see # 02-1667 - page 8 ft. note 1 of main brief filed by State of Tennessee on September 8, 2003, re: Tennessee Court of Criminal Appeals and Tennessee Supreme Court each denying *Lane* of extraordinary interlocutory appeal] Parallel to this concern is that this court made certain during oral argument that there was no "private right of action and no monetary relief under Tennessee law". [O'Connor J., see excerpts of oral argument in *Lane* in unpublished U.S.L.W. dated January 13, 2004–attached as Exhibit "C" to petitioner's answer to State Bar dated February 24, 2004].